COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2014-SC-000443-DG

REBECCA CLAYBURN — APPELLANT

vs.

On Appeal From Kentucky Court Of Appeals
Case No. 2012-CA-01680-Mr
Jefferson Circuit Court No. 11-CI-005052

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLEE

and

COMMONWEALTH OF KENTUCKY,
PUBLIC PROTECTION CABINET,
BOARD OF CLAIMS — APPELLEE

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY, TRANSPORTATION CABINET, DEPARTMENT OF HIGHWAYS

Marlin A. Jones
Counsel for the Transportation Cabinet
Office of Legal Services
200 Mero Street
Frankfort Kentucky 40622
(502) 564-7650

CERTIFICATE OF SERVICE

I hereby certify that a true copy hereof has been mailed this 6th day of November, 2015, to: Hon. Donald H. Smith, 11603 Shelbyville Road Suite 12, Louisville KY 40243; Hon. G. Mitchell Mattingly, Kentucky Board of Claims, 130 Brighton Park Blvd., Frankfort, Kentucky 40601; and Samuel P. Givens Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort KY 40601

Marlin A. Jones *Counsel for Appellee*

STATEMENT CONCERNING ORAL ARGUMENT

Appellee, Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, (Transportation Cabinet) respectfully moves the Court for an oral argument. Oral argument would be helpful to the Court in evaluating and analyzing the issues presented.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

I. THE COURT OF APPEALS ACTED WITHIN ITS DISCRETION WHEN IT ISSUED ITS OPINION WITHOUT HEARING ORAL ARGUMENTS

II. THE TRANSPORTATION CABINET CANNOT BE LIABLE FOR ITS DECISION TO STORE MATERIALS IN THE I-65/ I-264 GORE

A. The Cabinet's decision to store I-beams in the gore was discretionary.

B. The Cabinet had no duty to keep the gore free of obstruction.

COUNTERSTATEMENT OF THE CASE

This case arises from a vehicular accident that occurred on April 3, 2007.[1] At around 8:40 p.m.,[2] Appellant Rebecca Clayburn drove southbound on Interstate 65 in Louisville.[3] While attempting to merge onto Interstate 264 West from Interstate 65 South,[4] Clayburn noted a white Oldsmobile approaching from the rear.[5] The driver of the Oldsmobile, traveling in the right hand lane, came alongside Clayburn's vehicle, and attempted to merge into her lane, apparently failing to see Clayburn's vehicle.[6] To avoid a collision with the unknown driver, Clayburn drove off the roadway into the grassy area, or "gore,"[7] located between the I-65 lanes, and the I-264 interchange.[8] The unknown driver continued on.[9] When Clayburn drove into the gore, she struck metal I-beams lying in the grass.[10] The I-beams were not lying on the highway shoulder, or anywhere near the travelled portion of the interchange.[11] The materials had been placed several feet off the pavement, in the grass, away from the roadway. The impact caused damage to her vehicle,[12] as well as physical injury.[13]

Clayburn filed her original Board of Claims action on March 13, 2008, stating that the I-beams left in the gore constituted a debris hazard for which Appellee Commonwealth of Kentucky Transportation Cabinet should be liable.[14] The Claim was

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[1] *Hearing Transcript. Page 8 Line 7.*
[2] *Trans. Page 11 Line 15.*
[3] *Trans. Page 9; Board of Claims claim form attached as Appellee's Exhibit No. 1.*
[4] *Id.*
[5] *Trans. Page 77 Line 22.*
[6] *Trans. Page 12 Lines 11-15, Page 78 Lines 7-10.*
[7] *A gore is a triangular piece of land found where roads or rivers merge or split. Wikipedia.*
[8] *Trans. Page 10, Lines 13-17; Board of Claims claim form attached as Appellee's Exhibit No. 1.*
[9] *Trans. Page 63, Lines 17-18.*
[10] *Trans. Page 10, Line17; Page 12, Lines 24.*
[11] *Trans. Page 127.*
[12] *Trans. Page 14, Lines 4-7.*
[13] *Trans. Pages 20-21.*
[14] *See Board of Claims claim form attached as Appellee's Exhibit No. 1.*

heard on October 29, 2010. At the Hearing, the Transportation Cabinet defended the Claim based on qualified sovereign immunity, and the actions of Clayburn and the unknown driver.

The Cabinet produced Jason Richardson, the employee who oversaw sign placement in Jefferson County.[15] He testified at length concerning the Transportation Cabinet's duties and responsibilities to travelers alongside gore areas.[16] He stated that the I-beams Clayburn encountered were construction materials for a traffic panel sign.[17] He admitted that panel signs at the approach to gore areas are frequently struck by drivers.[18] For that reason, the panel sign in the 1-65/ I-264 interchange was designed to "break away" into pieces when struck.[19] These pieces are made to be re-used whenever possible,[20] and the Cabinet utilizes them in subsequent sign construction.[21] For that reason, the Cabinet routinely places broken away I-beams in the I-65/ I-264 gore[22] to be re-used later.[23] This has been a Cabinet policy for many years.[24] Richardson testified that these materials had never presented a danger to interstate drivers,[25] and that there are no rules, policies, or regulations within the Cabinet which forbade the use of gore areas in this fashion. [26] He affirmed that the "the gore is not meant for vehicular travel."[27] Clayburn produced no rebuttal evidence on these points.

Richardson admitted that the Cabinet does not erect signage to alert drivers to the

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[15] *Trans. Pages 83-84.*
[16] *Trans. Pages 83-113.*
[17] *Trans. Page 84, Lines 21-24.*
[18] *Trans. Page 108, Lines 15-21; Page 101, Lines 20-25.*
[19] *Trans. Page 92 Lines 15-22.*
[20] *Trans. Page 100, Lines 14-21.*
[21] *Trans. Page 100, Lines 14-21; Page 116, Lines 10-11; Page 127, Lines 16-24.*
[22] *Trans. Page 119, Lines 6-10.*
[23] *Trans. Page 100, Lines 14-21; Page 116, Lines 10-11; Page 127, Lines 16-24.*
[24] *Trans. Page 100, Lines 20-21.*
[25] *Trans. Page 101, Lines 1-6.*
[26] *Trans. Page 100, Lines 1-10; Pages 116-117.*
[27] *Trans. Page 91, Lines 9-12.*

presence of these construction materials in the gore areas.[28] He stated that this is chiefly because, again, gore areas are not meant for vehicular traffic.[29] Richardson testified that the Transportation Cabinet takes specific steps to alert drivers that the gore is not to be entered.[30] The pavement approaching gore areas is specifically delineated with extra wide edge striping designed to apprize drivers of their driving boundaries as they enter the interchange.[31] He verified that the I-65/ I-264 gore was striped in that fashion. [32]

The Transportation Cabinet produced Carey Cassell, the employee responsible for grounds keeping on state owned property in Jefferson County.[33] Cassell also testified that the gore is not meant for vehicular traffic,[34] and that the Cabinet leaves sign construction materials in gore areas as a matter of practice.[35] In fact, the Cabinet's grounds keeping contracts require grounds keepers to leave construction materials, such as those Clayburn encountered, undisturbed.[36] He testified that when construction materials are in the roadway, they remove them,[37] but, if "they are off in the grass they let them lie."[38]

Finally, the Cabinet also produced Todd Reeb, the employee who oversaw maintenance of the interstate roadway.[39] Reeb also testified that the Transportation Cabinet routinely leaves sign construction materials in the I-65/ I-264 gore for re-use by

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[28] *Trans. Page 109.*
[29] *Trans. Page 93, Lines 4-7.*
[30] *Trans. Page 91, Lines 16-21; Page 128, Lines 14-19.*
[31] *Id.*
[32] *Trans. Page 128, Lines 20-23.*
[33] *Trans. Pages 114-115.*
[34] *Trans. Page 128, Lines 7-9.*
[35] *Trans. Pages 116-117.*
[36] *Trans. Page 117, Lines 6-13.*
[37] *Trans. Page 127, Lines 13-18.*
[38] *Id.*
[39] *Trans. Pages 123-124.*

construction crews.[40] Both Cassell and Reeb further confirmed that there are no rules, internal policies, or regulations preventing this practice.[41]

On November 1, 2010, the Hearing Officer issued Recommended Findings of Fact and Conclusions of Law in favor of the Transportation Cabinet.[42] Clayburn took written exception to these findings.[43] Upon review of the record, the Board of Claims issued a subsequent Order on January 20, 2011, requiring the Parties to file briefs on the issues presented.[44] On April 28, 2011, the Hearing Officer issued another set of Findings of Fact and Conclusions of Law.[45] Again, he found in favor of the Transportation Cabinet.[46] The Hearing Officer expounded on his earlier findings as follows:

> I conclude that it was the legal duty of the respondent [Transportation Cabinet] to exercise ordinary care so as to prevent injuries and damages from defects in the highway. I further conclude that it was the legal duty of the claimant [Clayburn] to exercise ordinary care so as to keep a proper lookout to avoid an accident, having regard for the condition and use of the highway. In addition, I conclude that it was the legal duty of the unknown non-party driver who veered into the claimant's lane of the roadway to exercise ordinary care so at to keep a proper lookout and to avoid an accident, having regard for the condition and use of the highway.
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> I do not discern any negligence on the part of the claimant which was a substantial factor in causing or bring about her traffic accident.
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> As the Kentucky Supreme Court stated in Commonwealth of Kentucky v. Babbitt, 172 S.W.3d 786 (Ky. 2005), the highway authority is not automatically liable every time a motorist drives his vehicle off the traveled portion of the highway and strikes a roadside hazard.
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> I do not discern that the acts or actions of the respondent were a substantial factor in causing or bringing about the claimant's traffic mishap. However, I do conclude

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[40] *Trans. Page 127, Lines 19-24.*
[41] *Trans. Page 116-117; Page 127, Lines 10-13.*
[42] *November 1, 2010 Recommended Findings of Fact and Conclusions of Law attached to Appellant's Brief as Exhibit B.*
[43] *Exceptions to November 1, 2010 Recommended Order attached as Appellant's Brief as Exhibit C.*
[44] *January 20, 2011 Board of Claims Order attached Appellant's Brief as Exhibit No. 1.*
[45] *April 28, 2011 Recommended Findings of Fact and Conclusions of Law attached to Appellant's Brief as Exhibit F.*
[46] *Id.*

> that the negligence of the unknown non-party driver who veered into the claimant's lane of the roadway was the proximate cause of the claimant's accident, injuries and damages.[47]

On June 16, 2011, the Board issued its Final Order adopting those findings, and ruling in favor of the Transportation Cabinet.[48] The Board did not address the issue of the Cabinet's qualified immunity.[49]

On or about July 20, 2011, Clayburn filed an Appeal to Jefferson Circuit Court, Division Nine.[50] Over the next year, the Parties submitted written pleadings, and conducted oral argument on the issues. On September 11, 2012, the Circuit Court issued an Order and Judgment reversing the Board of Claims decision.[51] The Court ruled that the construction materials constituted a "trap" for which the Cabinet should be liable.[52] The Court stated as follows:

> The Cabinet has a "duty to exercise ordinary care to keep, not only that part of its streets that has been set apart for and is customarily used by the traveling public in a reasonably safe condition, but that it must also exercise the same degree of care with respect to such parts of its streets as lie immediately adjacent to or in the margin of the traveled part." City of Lancaster v. Broaddus, 216 S.W. 373 (Ky.1919). The state is not liable for failure to keep highway shoulders in reasonably safe condition, except for defects that are obscured from the view of ordinary travelers and are so inherently dangerous as to constitute traps. Dillingham v. Dept. of Highways, 253 S.W.2d 256 (Ky.1952).[53]
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> Based on [Commonwealth Transportation Cabinet Department of Highways v. Shadrick, 956 S.W.2d 898 (Ky.1997)], the Cabinet may be liable for hazards created by the Cabinet and/or not in plain view of motorists.[54]
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> The Cabinet knew or should have known that drivers, even the most prudent and careful, willingly are forced to leave the roadway on occasion. This is evidenced by the Transportation Cabinet's policies of marking lanes, use of warning lights,

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[47] *Id.*
[48] *June 16, 2011 Board of Claims Final Order attached to Appellant's Brief as Exhibit G.*
[49] *Id.*
[50] *August 1, 2011Complaint attached to Appellant's Brief as Exhibit J.*
[51] *September 11, 2012 Circuit Court Order and Judgment attached to Appellant's Brief as Exhibit J.*
[52] *Id.*
[53] *Id.*
[54] *Id.*

> signs, barricades, guardrails, and breakaway construction materials. While Clayburn would not have been in the gore area but for the other driver's negligence, the Board does not address the extent of Clayburn's injuries or damages caused by the hazard created and obscured by the Transportation Cabinet.[55]

Based on these factual determinations, most of which were not reached by the Board of Claims,[56] the Court overturned and remanded the case to the Board for further findings on the extent of the Transportation Cabinet's fault in creating or contributing to Clayburn's damages.[57] The Circuit Court ignored the issue of the Cabinet's qualified immunity.[58]

On October 3, 2012, the Cabinet filed its Notice of Appeal to the Kentucky Court of Appeals. Both Parties submitted Briefs on the issues, and both sought oral argument on the issues. After the briefs were filed the Court scheduled oral arguments for November 15, 2013. Clayburn moved to reschedule the argument based on Counsel's health issues, and the Court granted that Motion. However, the Court never set a date for the oral argument, and on May 23, 2014, issued Opinion No. 2012-CA-001680, reversing the Jefferson Circuit Court, and remanding the case to the Board of Claims with Orders to dismiss based on lack of jurisdiction.[59] The Court stated as follows:

> The Transportation Cabinet initially points out that the Board of Claims merely possesses jurisdiction over the negligent performance of a ministerial act per KRS 44.073(2). The Transportation Cabinet contends that the Board of Claims lacked jurisdiction because its alleged negligent act was intrinsically discretionary. In support thereof, the Transportation Cabinet specifically points out that no statutes or regulations mandate the inspection or maintenance of gore areas along a roadway. The Transportation Cabinet acknowledges its ministerial duty to maintain the roadway but adamantly argues that no such ministerial duty

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[55] *Id.*
[56] *June 16, 2011 Board of Claims Final Order attached to Appellant's Brief as Exhibit G.*
[57] *September 11, 2012 Circuit Court Order and Judgment attached to Appellant's Brief as Exhibit J.*
[58] *Id.*
[59] *Court of Appeals Opinion Reversing and Remanding with Directions attached to Appellant's Brief as Exhibit A.*

> has previously been extended to gore areas alongside the roadway. KRS 176.050(1)(a). In light of no precedent, statute, or regulation imposing a duty as to gore areas, the Transportation Cabinet asserts that no ministerial duty exists to remove the beams in the gore area; rather, the maintenance and inspection of such areas are purely discretionary. Thus, the Transportation Cabinet contends that the Board of Claims lacked jurisdiction over Clayburn's claim.
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> We are persuaded by the Transportation Cabinet's argument and hold that maintenance or inspection of the gore area constitutes a discretionary act. Pivotal to our decision is the absence of precedent, statute, or regulation imposing a duty upon the Transportation Cabinet to maintain or inspect the gore area alongside a highway. And, we are aware of no other authority requiring regular or recurrent inspection or maintenance of the gore area. Rather, the inspection and maintenance of the gore area is left to the discretion of employees at the Transportation Cabinet. This by definition constitutes a discretionary act. Commonwealth, Transp. Cab., Dept. of Highways v. Sexton, 256 S.W.3d 29 (Ky. 2008). As a discretionary act, the Board of Claims lacked jurisdiction over Clayburn's negligence claim against the Transportation Cabinet per KRS 44.073(2). See Sexton, 256 S.W.3d 29.[60]

The Court did not produce an order or motion dispensing with oral argument prior to issuing this ruling.[61] On June 10, 2014, Clayburn submitted a Petition for Rehearing based on the Court's ruling and its failure to schedule oral argument. On July 9, 2014, the Court of Appeals denied Clayburn's Petition for Rehearing.[62] Clayburn now seeks to overturn the Court of Appeals decision and have the Jefferson Circuit Court Order and Judgment affirmed.

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[60] *Id.*
[61] *See CR 76.16(1)*
[62] *July 9, 2014 Court of Appeals Order Denying attached to Appellant's Brief as Exhibit M.*

ARGUMENT

Preservation of Error.

The issues presented were preserved in the Board of Claims by Exceptions filed within 15 days of the Hearing Officer's Recommended Findings of Fact and Conclusions of Law.[63] At each phase of this proceeding, the Commonwealth set forth timely objections and sought appropriate relief, now by way of this review.

I. THE COURT OF APPEALS ACTED WITHIN ITS DISCRETION WHEN IT ISSUED ITS OPINION WITHOUT HEARING ORAL ARGUMENTS

Clayburn argues that the Court of Appeals erred when it issued its May 23, 2014, Opinion without hearing oral argument. She relies on CR 76.12 *Briefs*, and 76.16 *Oral Argument*, to contend that the Court of Appeals was required to hear argument, and its failure to do so constituted a violation of the Kentucky Rules of Civil Procedure. However, oral argument is entertained purely at the discretion of the appellate court. *See* CR 76.12; CR 76.16; *also Combs v. Kentucky Court of Appeals*, 312 S.W.3d 363 (Ky. 2010). Clayburn had no established right to an oral argument, and the Court of Appeals acted within its powers when it issued its Opinion without hearing argument. *Id.*

In their Court of Appeals briefs both Parties asked for oral arguments. The Court granted the requests and scheduled oral arguments for November 15, 2013. However, the Court issued its May 23, 2014, Opinion without hearing arguments. In her Appellant's Brief before this Court, Clayburn argues that in granting the Parties' initial requests, the Court of Appeals "bound themselves to hold the oral arguments, 'unless the appellate court directs otherwise on its own motion or on motion of one or more of the parties to

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[63] *May 10, 2011 Exceptions to Recommended Order of April 11, 2011 attached as Appellee's Exhibit No. 2*

the appeal.'" *See* CR 76.16(1). But, this is not the law.

CR 76.12(4)(c)(ii) specifically says that the "Statement Concerning Oral Argument" ***is not binding on the Court*** and does not preclude a party's right to file a motion to reconsider the Court's ruling that oral argument will be dispensed with." *See id.* (Emphasis added). By its own language, CR 76.12 creates no duty to hold oral arguments, even in instances where they have been previously granted. *See id.* Neither the Court of Appeals nor this Court is bound to hear oral argument prior to reaching a decision. *Id*; *see also* Combs *v. Kentucky Court of Appeals*, 312 S.W.3d at 363.

Clayburn further contends that in failing to produce an order dispensing with oral argument, the Court of Appeals deprived the Parties of their right to "object and file a motion to reconsider within (10) days of the motion or order to dispense with oral argument . . ." Clayburn quotes CR 76.16(1),which states, in pertinent part, as follows:

> In any case ***where the court orders on its own motion*** that **oral argument** shall be dispensed with, any party shall have ten (10) days from the date of the order in which to object and ask for reconsideration. No opinion shall be rendered until the time has expired for making such objection and motion for reconsideration, or if such objection and motion is made, until it can be decided.

CR 76.16(1) (Emphasis added). Pursuant to the plain language of the rule, any objection or motion for reconsideration ***must come pursuant to a court order or motion*** dispensing with oral argument. This means that the right to object and ask for reconsideration accrues ***only after*** there is a court order or motion. *See id.* Here, the Court of Appeals never produced an order or motion dispensing with oral argument; therefore, the parties were never vested with any 'right' to object. *See id.* Though this position seems overly technical, it is bolstered by two important points. First, it must be noted again that requests for oral argument are not binding on the court. *See* CR

76.12(4)(c)(ii). Secondly, both CR 76.12 and CR 76.16 reflect the controlling jurisprudence on this issue of appellate oral argument. *See Combs*, 312 S.W.3d at 363.

In *Combs v. Kentucky Court of Appeals*, Appellant brought an action before this Court asking that CR 76.16(1) be judged unconstitutional. *Combs* 312 S.W.3d. at 363. Appellant Combs argued specifically that "unless waived by the parties to the appeal, all cases before the Court of Appeals and Supreme Court of Kentucky must be orally argued before being submitted for decision." *Id.* at 364. In response, this Court stated unequivocally that"[t]here is no constitutional right to oral argument and this Court will not exercise its jurisdiction to create a rule requiring oral argument." *Id.* The Court explained its decision in the footnotes of the case as follows:

> The open courts provision of the Kentucky Constitution, *Ky. Const. § 14*, does not explicitly provide a right to oral argument before Kentucky's appellate courts. And Kentucky courts have never interpreted *Ky. Const. § 14* as guaranteeing a right to oral argument before Kentucky appellate courts. Similarly, no other provision of the Kentucky Constitution or the United States Constitution provides a right to oral argument before Kentucky appellate courts.

Id. The law is unambiguous: Clayburn has no right to an oral argument, either before the Court of Appeals, or the Supreme Court. *See id.* This Court addressed the issue specifically, and declined to create such a right. *Id.*

Clayburn put the issue of oral argument before the Court of Appeals in her June 10, 2014 Motion for Rehearing. The Court reviewed her Motion and denied it. The Court was within its authority when it did so because even though they were previously granted and scheduled, the Parties' initial requests for oral argument were not binding. *See* CR 76.12(4)(c)(ii). Furthermore, strict interpretation of the Civil Rules requires that an "order or motion" be produced by the appellate court before the Parties can have any grounds to object and ask for reconsideration. *See* CR 76.16(1). The point here is that

oral arguments are not required before an appellate court is empowered to reach a decision. Therefore, the appellate courts ***cannot be bound*** to hear arguments. CR 76.12; CR 76.16; *Combs*, at 364. Clayburn has basically taken issue with an instance of judicial economy. The Court of Appeals deemed that oral argument was not needed on this case, and exercised its constitutional discretion to rule on it without further procedure. *Combs*, at 364. Clayburn cannot force the Court of Appeals to re-hear this case simply to entertain an oral argument. *Id.*

II. THE TRANSPORTATION CABINET CANNOT BE LIABLE FOR ITS DECISION TO STORE MATERIALS IN THE I-65/ I-264 GORE

With or without oral arguments, the Court of Appeals correctly addressed the salient issue of this case: whether the Transportation Cabinet could be liable for failing to warn drivers of construction materials stored off the roadway in the grass. Though the law creates a duty encompassing the roadway "and the area immediately adjacent to the roadway," *City of Lancaster v. Broaddus*, 216 S.W. 373 (Ky. 1919), the Cabinet's duty does not extend beyond that area. *See id.* The Court of Appeals rightly held that the because there are no rules or regulation pertaining to gore areas, storing the I-beams in the I-65/I-264 gore was a discretionary activity for which the Cabinet could not be liable. *See Commonwealth Department of Highways v. Sexton*, 256 S.W.3d 29 (Ky. 2008); *also Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001).

A. The Cabinet's decision to store I-beams in the gore was discretionary.

As the Court is well aware, agencies of the Commonwealth have historically enjoyed immunity when engaged in discretionary decision making. *See KY.CONST. § 231; Yanero v. Davis*, 65 S.W.3d 510, 524 (Ky. 2001). Since at least 1828, *KY.CONST. § 231*

has been interpreted to uphold the doctrine of governmental immunity, unless it is specifically waived, and even then, only in the manner provided by the waiver. *See Yanero*, 65 S.W.3d at 517-518. In *Yanero*, this Court defined discretionary acts as those involving (1), the exercise of discretion and judgment, or personal deliberation, decision, and judgment, (2), in good faith, (3), within the scope of the state employee's authority. *Yanero*, 65 S.W.3d at 522. In contrast, ministerial acts, for which the Commonwealth can be answerable ". . . require only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id.* at 522. *See also Commonwealth Department of Highways v. Sexton*, 256 S.W.3d 29, 33 (Ky. 2008) (defining ministerial act as those that "are routine and typically established by statutes or regulations that very clearly and specifically set forth those actions that the agency must take.") The Commonwealth's discretionary immunity applies in the Board of Claims, as well as the courts. *See* KRS 44.073(2); *also Collins v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet*, 10 S.W.3d at 125, *construing* KRS 44.073(2) ("This provision clearly establishes that . . . the negligent performance of non-ministerial, i.e., discretionary, acts cannot be a basis for recovery under the Act.")

The Transportation Cabinet's activities in the I-65/ I-264 gore were discretionary. Jason Richardson, the employee who oversaw sign placement and construction in Jefferson County, stated unequivocally that there are no rules, policies, or regulations within the Cabinet which forbade the use of gore areas in this fashion, and the Cabinet exercised its own discretion and judgment in determining the proper storage of these construction materials. The Cabinet presented undisputed proof that these materials are

re-used by sign construction crews when signs in the area are replaced or repaired. There is no evidence, and no dispute, as to whether the decision was made in good faith, within the scope of state employees' authority. *See Yanero*, 65 S.W.3d at 522.

Furthermore, as the Court of Appeals found, there are no statutes or regulations governing the use of gore areas in this fashion. This finding is crucial because the law of the Commonwealth holds that where there are no statutes or regulations specifically establishing a duty, the actions taken by a state agency must be viewed as discretionary. *Commonwealth Department of Highways v. Sexton*, 256 S.W.3d at 29 (holding that where there are no statutes or regulations specifically establishing a duty on the part of a state agency, its decisions must be viewed as discretionary acts for which there can be no liability).

Sexton is the current benchmark on the issue of discretionary versus ministerial activities. 256 S.W.3d at 29. It centered on the question of whether the Transportation Cabinet had a duty to inspect dead trees on its land in the absence of any statute or regulation creating such a duty. *Id.* This Court held that the Cabinet had no such duty in the absence of a statute or regulation, thus, the decision not to inspect was discretionary. *Id.* As previously stated, there are no statutes or regulations governing the use of gore areas. However, the *Sexton* rule is fact specific, and therefore, subject to caveat. This Court further elaborated on it as follows:

> In some situations, an act may be ministerial even if that act is not specifically covered by applicable statutes, or administrative regulations. For example . . . if a state entity has actual notice of the existence of a dead or dangerous tree on property owned by that state entity, inspecting or removing the tree may be a ministerial act.

Id. at 33. This means that based on the circumstances presented, an action can be

intrinsically ministerial in nature even though there are no controlling statutes, or regulations. *Id.* Pursuant to *Sexton*, such an instance would occur when an inherently dangerous condition exists that the Cabinet would routinely rectify, upon acquiring notice of it, such as in the dead tree example cited by the *Sexton* Court. *Id.*

This caveat is the crux of Clayburn's argument: even though there are no rules pertaining to gore areas, warning or removal of the I-beams was an intrinsically ministerial duty because the I-beams were dangerous, and the Cabinet had specific knowledge that they were in the gore. However, this is an over-simplification of the facts presented as well as the law.

The Cabinet's actions were not intrinsically ministerial, because there was no defective or dangerous condition. The record shows that the I-beams were situated several feet away from the road in the grass, and they had never before presented a problem for motorists. Beyond that, the Cabinet specifically marked the driving boundaries of the roadway with extra wide white striping to clearly denote the driving lanes. Clayburn encountered the I-beams only after she intentionally drove completely off the roadway into the grass. The injuries occurred not because the Cabinet failed to provide for public safety, but rather because of the unknown driver, and Clayburn's own actions. "The Highway authority is not automatically liable every time a motorist drives his vehicle off the traveled portion of the highway and strikes a roadside hazard." *Commonwealth v. Babbitt*, 172 S.W.3d 786 (Ky. 2005).

The Transportation Cabinet's decision to store construction materials in the I-65/ I-264 gore was made in good faith at the discretion of an employee acting within the scope of his employment. *See Yanero*, 65 S.W.3d at 522 (defining discretionary activity).

Because there are no statutes, regulations, or even internal policies, forbidding this activity, the Cabinet cannot be held liable for that choice. *See Sexton*, 256 S.W.3d at 29, *also Franklin Co. v. Malone,* 957 S.W.2d 195, 201 (Ky. 1997) ("[t]he essence of a discretionary power is that the person or persons exercising it may choose which of several courses will be followed").

B. The Transportation Cabinet had no duty to keep the gore free of obstruction.

Clayburn has a formidable task. There is no ministerial duty concerning gore areas. She is forced to concede this. So, because the law is settled, her argument is not one of interpretation, but rather, modification. She attempts to expand the long standing precedent concerning the Commonwealth's duties vis a vis roadside hazards. *See City of Lancaster v. Broaddus*, 216 S.W. 373 (Ky. 1919); *Dillingham v. Department of Highways*, 253 S.W.2d 256 (Ky. 1952); *Falender v. City of Louisville, Ky.*, 448 S.W.2d 367 (Ky. 1969); *Commonwealth of Kentucky Transportation Cabinet Department of Highways v. Shadrick*, 956 S.W.2d 898 (Ky. 1997). Clayburn proficiently discusses these cases. However, she ignores a conclusive point: the jurisprudence concerns defects on the roadway, and the area immediately adjacent to it, i.e., the shoulder. ***The duty has not been extended to the areas beyond***. *See below.* In fact, the trend has been to limit, not expand this duty. *Id.*

In *City of Lancaster v. Broaddus*, 216 S.W. 373 (Ky. 1919), the old Kentucky Court of Appeals set forth the seminal precedent on governmental liability for roadside hazards. In *Broaddus*, a driver attempting to pass an oncoming wagon, drove off the immediate edge of the roadway, and struck excavation that was concealed by weeds. *Id.* at 374. In discussing the case, the Court quoted from Thompson on Negligence vol. 5

§6055, which states as follows:

> To make a distinction between cases where the excavation is within the true line of the highway or exactly upon it, and cases where it is beyond it, but close to it, presents an unworthy refinement and a judicial trifling with human life. The existence of such dangerous places, although outside the traveled portion of the highway, or even outside the highway itself, may so endanger public travel, unless suitable guards or barriers are erected, as to raise a duty on the part of the municipality to erect such guards or barriers along the margin of the traveled portion of the highway, or even along the external portion of the highway as laid out, so that if a traveler is injured in consequence of a want of such barriers, he may have an action for damages against the municipality, although the injury in fact took place outside the limits of the traveled path.

Broaddus, at 376. Clayburn uses this language as grounds for expanding the Cabinet's duties to include the area "even outside the highway itself." *Id.* However, it this is not the actual holding of *Broaddus*. That Court went on to rule that cities have a duty to "exercise ordinary care to keep, not only that part of its streets that has been set apart for and is customarily used by the traveling public in a reasonably safe condition, but that it must also exercise the same degree of care with respect to such parts of its streets as ***lie immediately adjacent to or in the margin of the traveled part.***" *Id.* at 375. (Emphasis added.) The *Broaddus* Court extended municipal liability only as far as what is currently defined as the roadside shoulder, not beyond. *Id.*

The Court revisited this issue 33 years later in *Dillingham v. Department of Highways*, 253 S.W.2d 256 (Ky.1952). There, a driver drove on a state road with his right wheels on the shoulder in an attempt to avoid an accident. In doing so, the right wheels fell into a ditch that "had existed immediately adjacent to the surface of the highway . . ." 253 S.W.2d at 256. The *Dillingham* Court affirmed *Broaddus*, regarding public agencies' responsibility to maintain the immediately adjacent area, or shoulder, of the road. *Id.* at 256. However, the *Dillingham* Court limited *Broaddus* by mitigating this

liability based on the potential negligence of drivers in these situations. The Court ruled that "the State is ***not liable for its failure to maintain the shoulders of a highway*** in a reasonably safe condition for travel ***except*** as to defects which are obscured from the view of the ordinary traveler and are so inherently dangerous as to constitute traps." *Id.* at 257. (Emphasis added.) Pursuant to *Dillingham*, the Transportation Cabinet can be liable for failure to maintain a roadway shoulder with regard to obscured defects ***only***. *Id.* Though Clayburn glosses over this point, *Dillingham* significantly narrowed the Cabinet's duty with regard to roadside hazards. *Id.*

The Court visited this issue again in *Falender v. City of Louisville, Ky.*, 448 S.W.2d 367 (Ky. 1969). In that case, a motorist drove off the blacktop into a rut that ran along the edge of the pavement. *Falender,* 448 S.W.2d at 369. This rut caused plaintiff to lose control, and fatally crash. *Id.* The *Falender* Court criticized the *Dillingham* decision, referring to its limitation on the Cabinet's duty as "rather obliquely qualified." *Id.* at 371. But, the Court re-iterated the soundness of the *Broaddus* decision, and re-affirmed that public agencies "owe motorists [a] duty to maintain, in reasonably safe condition***, the immediate area adjacent to highways or streets likely to be used by traveling public.***" *Falender*, at 370. (Emphasis added.). Even though it criticized *Dillingham*, the *Falender* Court did not overturn the limitations *Dillingham* imposed. *See Falender*, at 367.

In 1997, this Court addressed the specific issue of whether a vehicle parked on the shoulder of the road constituted a trap for which the Transportation Cabinet could be liable. *See Commonwealth of Kentucky Transportation Cabinet Department of Highways v. Shadrick*, 956 S.W.2d 898 (Ky. 1997). The *Shadrick* Court affirmed both *Dillingham*

and *Falender*, re-iterating the Cabinet's duty to protect "***highway shoulders*** against defects which are obscured from the view of ordinary travelers and are so inherently dangerous as to constitute traps." *Shadrick*, 956 S.W.2d at 901, *citing Dillingham*, 253 S.W.2d at 257. (Emphasis added). The *Shadrick* Court went on to rule in favor of the Transportation Cabinet, specifically stating that "the Department's duty with respect to the maintenance of roads is to maintain them in a reasonably safe condition for those members of the traveling public exercising due care for their own safety." *Shadrick*, at 901.

The *Sexton* Court also addressed the issue of roadside hazards. There, this Court specifically explained how the Transportation Cabinet's discretionary activities intertwine with KRS 176.050 *Duties of Department*, which sets forth the general duty to "[i]nvestigate all problems relating to the construction and maintenance of roads in the state." *Id.* This simple language carries broad ministerial implications. Clayburn touched on this lightly. The Court stated as follows:

> We are unaware of any statutes or regulations specifically establishing a duty that the highway department inspect trees on its lands. It does have a duty to "[i]nvestigate all problems relating to the construction and maintenance of roads in the state," which may have led to some tree inspections where the trees could have potentially affected the construction and maintenance of roads. But despite relatively close proximity to a highway department construction site, the condition of the trees in the vacant lot owned by the Commonwealth here did not affect the construction or maintenance of roads in any manner.

Sexton, 256 S.W.3d at 34, *quoting* KRS 176.050(1)(a). In spite of the Cabinet's statutory duty to inspect all problems related to road construction and maintenance, the *Sexton* Court refused to apply this duty to instances that "***did not affect the construction or maintenance of roads in any manner . . . despite relatively close proximity to a highway department construction site***." *Id.* at 34. (Emphasis added).

The case law regarding roadside hazards is clear. The Transportation Cabinet can only be liable for defects that occur on the roadway or the roadway shoulder; and even then, only to the extent that the defects are hidden and constitute traps. *See Shadrick*, 956 S.W.2d at 901. Moreover, the Cabinet has no duty to even inspect for problems that do not affect the construction or maintenance of roads. *Sexton*, at 34. Over the ninety six (96) years since *Broaddus*, this Court has observably limited the Commonwealth's duty with regard to roadside hazards. The *Shadrick* Court made plain the rationale behind this sentiment when it stated that "we decline to extend the law to the point of guaranteeing that every right-of-way will be completely free of all obstructions, whether permanent or transitory, for motorists who operate their vehicles into that area of the roadway." *Shadrick*, at 901. The Board of Claims recognized this when it correctly stated that, "[t]he Highway authority is not automatically liable every time a motorist drives his vehicle off the traveled portion of the highway and strikes a roadside hazard." *Citing Commonwealth v. Babbitt*, 172 S.W.3d at 786.

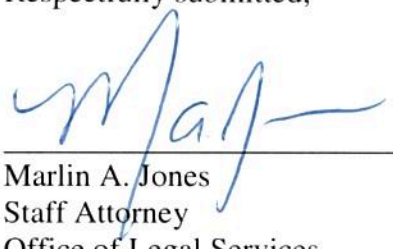
The Transportation Cabinet had no duty to keep the untraveled gore area free of construction materials. *Dillingham*, 253 S.W.2d at 256; *Shadrick*, 956 S.W.2d at 898; *Sexton*, 256 S.W.3d at 29. Because there was no duty, there can be no liability. *See Shadrick*, at 900 (holding that the absence any one of the elements of negligence is fatal to a claim against the Commonwealth).

CONCLUSION

The Court of Appeals is a court of appellate jurisdiction. Neither the Kentucky Civil Rules nor the case law create a requirement that oral arguments be held before an appellate court is allowed to rule on a case. The Court of Appeals acted within its

discretion in deciding this case without oral argument because its prior decision to hear argument was non-binding. This case should not be re-heard simply to rectify an instance of judicial economy. Beyond that, the merits of the case have been decided. As a department of the Commonwealth, the Transportation Cabinet is shielded from liability for the performance, or non-performance of discretionary acts or functions. Here, the Cabinet used that discretion when it stored construction materials in the I-65/ I-265 gore. There were no rules or regulations governing activities in the gore, and the Cabinet had no legal duty to inspect or warn. Appellee respectfully moves this Court to affirm Court of Appeals Opinion No. 2012-CA-001680 reversing the Jefferson Circuit Court and remanding to the Board of Claims with directions to dismiss based on qualified sovereign immunity.

Respectfully submitted,



Marlin A. Jones
Staff Attorney
Office of Legal Services
Kentucky Transportation Cabinet
200 Mero Street
Frankfort KY 40601
502-564-7650 (Office)
502-564-5238 (Fax)
marlin.jones@ky.gov